IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 5TH OCTOBER 2007 / 13TH ASWINA 1929

W.A.No.166 of 2006(B)

(AGAINST THE JUDGEMENT IN O.P.NO.6280/1994 Dated 29/07/2005)

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APPELLANTS/RESPONDENTS:-

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1. THE STATE OF KERALA,
   REP. BY THE SECRETARY TO GOVERNMENT (TAXES),
   SECRETARIAT,
   THIRUVANANTHAPURAM.

2. THE BOARD OF REVENUE (EXCISE),
   THIRUVANANTHAPURAM.

3. THE ASST. EXCISE COMMISSIONER,
   THRISSUR.

4. THE EXCISE INSPECTOR,
   CHALAKUDY RANGE,
   CHALAKUDY.

BY SENIOR GOVERNMENT PLEADER SRI.P.K.BABU.

RESPONDENT/PETITIONER:-

ABRAHAM VARKEY,
PAPPADINIL HOUSE,
THEKKUMBHAGOM,
KARIKODE,
THODUPUZHA.

BY ADV. SRI.RAJU JOSEPH.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 05/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

H.L.Dattu,C.J. & K.T.Sankaran,J.

W.A.No.166 of 2006-B

Dated, this the 5th day of October, 2007

JUDGMENT

H.L.Dattu,C.J.

The Revenue is before us in this appeal being aggrieved by the orders passed by the learned Single Judge in O.P.No.6280 of 1994 dated 29.7.2005.

(2) The learned Single Judge while disposing of the matter has merely relied upon the observations made by a Bench of this Court in the case of *Lucka & others* v. *State of Kerala & others*, O.P.No.8271 of 1994 disposed of on 11.8.2000 along with O.P.No.2861 of 1995.

(3) We are informed that the State, being aggrieved by the orders passed in the case of *Lucka & others* v. *State of Kerala & others*, has carried the matter in Special Leave Petition before the apex Court. We are also informed that the apex Court has not granted any interim order of stay.

(4) Therefore, there is no impediment for us to dispose of this Writ Appeal.

(5) A Bench of this Court while disposing of the Original Petitions filed by Lucka and others, has observed as under:

> "4. In this connection we also refer to the terms of agreement entered into by the parties at the time of auction. Temporary contract was entered into and as per the temporary agreement Form No.I prescribed under Rule 5 (10), liability of the licencee, if the shop is reauctioned or taken on by the departmental management, is to reimburse the loss suffered by the Government. It is very clear from clauses 3 & 5 of the

temporary agreement. Form II is the prescribed permanent agreement where also the licencees have agreed to reimburse all the loss due to the cancellation of the licence. Therefore, they are liable only to reimburse the entire loss to the Government. In the absence of contract to the contrary, recovery of more amount than the loss incurred will amount to undue enrichment as held by the Supreme Court in Dy.Commr., Andaman Distt., Port Blair Vs. Consumer Co-op. Stores Ltd. { (1999) 1 SCC 507}. Since all the contracts in these original petitions were entered into before amendment of Rule 13, the petitioners are liable to pay only the actual loss suffered by the Government in realisation of rentals and excise duty. Apart from the absence of any clause in the agreement for forfeiture of departmental management fee, while calculating the loss suffered by Government, Rule 13 of the Departmental Management Rules existing at the time of executing the agreement, specifically provided for giving credit to departmental management fee collected unless the contractor fails to compensate security in case of resale. Therefore, balance amount taking into account the amount collected can be realised while calculating the loss suffered by the Government in view of cancellation of licence. Hence, all the demands are set aside and, the Government is directed to pass fresh demands in accordance with the rules and agreements executed with the licencees and rules recovering only the actual loss suffered by the Government taking into account the income received by the Government during the abkari year while it was under departmental management also. We are not pronouncing upon the validity of amended Rule 13 and application of the above ruling in those contractors who are entering the contracts after the amendment of the rule and participating in the auction with open eyes after seeing the rules."

(6) The learned Single Judge, keeping in view the facts and circumstances pleaded by the petitioner in O.P.No.6280 of 1994 being similar to what was decided by a Bench of this Court in Lucka's case, has allowed the Original Petition and has directed the authorities under the Abkari Act to pass fresh orders in accordance with the Rules and agreements executed with the licensees. Since the learned Single Judge has merely followed what has been said by a Division Bench of this Court, in our opinion, no error can be pointed out to the order passed by the learned Single Judge. In that view of the matter, interference with the impugned order passed by the learned Single Judge is not called for. Therefore, the Writ Appeal requires to be rejected and it is rejected.

Ordered accordingly.

H.L.Dattu
Chief Justice

K.T.Sankaran
Judge

vku/-